OCT 8 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 396

MILCO UNDERGARMENT CO., INC.

AND

BLOOMSBURG BRAIDING CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REGINALD S. HEMINGWAY,
238 Market Street,
Bloomsburg, Pa.,
Counsel for Petitioners.

JOHN F. DUMONT,
Stanton Building,
Little Falls, N. J.,
Counsel for Petitioners.

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

SUBJECT INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Specification of Errors to be Urged	6
Reasons for Granting the Writ	6
Conclusion	18
Appendix	19

CASES CITED

Atlantic Coast Line R. Co. v. Burkett, 192 F. 2d 941 (CA 5)	13
Balchunas v. Palmer, 151 F. 2d 842 (CA 2)	13
Bruno v. U. S., 308 U. S. 287	12, 13
Cervin v. W. T. Grant Co., 100 F. 2d 153 (CA 5)	14, 15
Commercial Banking Corp. v. Martel, 123 F. 2d 846 (CA 2)	14, 15
De Santa v. Nehi Corp., 171 F. 2d 696 (CA 2)	13
Downie v. Powers, 193 F. 2d 760 (CA 10)	11, 14
Electric Stop Nut Corp., 51 NLRB 694	17
Fairfield Engineering Co., 74 NLRB 827	16
Haspel, Ephraim, 109 NLRB No. 8, 34 LRRM 1280	16

CASES CITED—*Continued*

PAGE

Hawkins v. Missouri Pac. R. Co., 188 F. 2d 348 (CA 8) 11

Hoag v. City of Detroit, 185 F. 2d 764 (CA 6) 13

Hoffman v. Palmer, 318 U. S. 109, affirming 129 F. 2d 976 (CA 2) 11, 15

Kotteakos v. U. S., 328 U. S. 750 12

LaSalle Steel Co., 72 NLRB 411 16

Maguire v. Federal Crop Ins. Corp., 181 F. 2d 320 (CA 5) 12, 14, 15

McCandless v. U. S., 298 U. S. 342 .....8, 9, 15

McCoy v. Providence Journal Co., 190 F. 2d 760, cert. den., 342 U. S. 894 (CA 1) 13

Meaney v. U. S., 112 F. 2d 538 (CA 2) 12, 14, 15

Mead v. Cochrane, 184 F. 2d 579 (CA 7) 13

NLRB v. Indiana & Michigan Electric Co., 318 U. S. 9 .....7, 8-9

Remington Rand, Inc. v. Societe et al., 188 F. 2d 1011, cert den., 342 U. S. 832 (CA D. C.) 13

Sorrels v. Alexander, 142 F. 2d 769 (CA D. C.) 12

Universal Camera Corp. v. NLRB, 340 U. S. 474 10

University City, Mo. v. Home Fire & Marine Ins. Co., 114 F. 2d 288 (CA 8) 12, 13, 15

Valentine Sugars, Inc., 102 NLRB 313 16

Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F. 2d 383 (CA 4) 13

Winona Knitting Mills, Inc., 67 NLRB 1 17

Woods v. Gettelfinger, 108 F. 2d 549 (CA 5) 13

STATUTES

PAGE

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 141, *et seq.*):

Section 8 (a) (2) 19

Section 10 (b) 11, 19

Section 10 (e) 2, 19–20

Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sec. 1001, *et seq.*):

Section 10 (e) 9–10, 20

Federal Rules of Civil Procedure (28 U. S. C. foll. Sec. 2072):

Rule 43 (c). Record of Excluded Evidence 11, 14, 16, 21

Rule 61. Harmless Error ... 11, 12, 13, 14, 16, 21

"Harmless Error Statute" (40 Stat. 1181, former 28 U. S. C. Sec. 391) 21–22

Time for filing Petition for Writ (62 Stat. 961, 28 U. S. C. Sec. 2101 (c) 22

DECISIONS BELOW

PER CURIAM Opinion, May 18, 1954 23–24

Order Denying Rehearing, June 16, 1954 25

Decree, July 14, 1954 25–26

RULING IN THIS COURT

Ruling by Justice Jackson on "Application for Extension of Time", August 11, 1954 26–27

IN THE

Supreme Court of the United States

October Term, 1954

MILCO UNDERGARMENT CO., INC.

and

BLOOMSBURG BRAIDING CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Milco Undergarment Co., Inc., and Bloomsburg Braiding Corporation, petitioners herein, pray that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit to review the decree of that court entered on July 14, 1954, enforcing an order of the National Labor Relations Board, hereinafter called the "Board", issued August 18, 1953, under Section 10 of the National Labor Relations Act as amended.

Opinions Below

The findings of fact, conclusions of law and order of the Board are reported in 106 NLRB No. 125 (J. A. 409a).[1] The opinion of the Court of Appeals is reported in 212 F. 2d 801. (Appendix, p. 23–24).

Jurisdiction

The opinion of the Court of Appeals was filed on May 18, 1954, and its order denying the petition of Petitioners herein for rehearing is dated June 16, 1954. The Court of Appeals entered its decree on July 14, 1954.[2] The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Sec. 141, *et seq.*

Questions Presented

1. Were petitioners denied due process of law where the Trial Examiner erred, as found by the Board, in refusing to permit petitioners' counsel to cross-examine a major witness on her credibility, *and* the Trial Examiner ex-

---

1. "J. A." designates references to the page numbers of the Joint Appendix of the parties below. The Joint Appendix also shows, on separate lines, the page numbers of the typewritten transcript of record certified and filed below by the Board.

2. On August 11, 1954, petitioners in order to make certain of the date when the ninety days allowed in 28 U. S. C. Section 2101 (c) began to run in these cases, filed an Application to an Associate Justice, under Rules 22 (4), 35 (2) and 50 of the Revised Rules of this Court, to extend and grant time for filing this Petition until October 12, 1954, which is ninety days from the date of the entry of the Court of Appeals decree of July 14, 1954. On August 11, 1954, Associate Justice Jackson denied this Application "for the reason that the time runs from the entry of decree and extension is unnecessary". (Appendix, p. 27).

pressly rejected an offer of proof of what petitioners' counsel expected to prove in such cross-examination?

2. Whether the Board's order, enforced by the decree below, is supported by substantial evidence, on the record considered as a whole, as required by the Amended Act?

3. Whether the remedy in the Board's order, enforced by the decree below, requiring disestablishment of the Association by petitioners, exceeds the scope of the Board's remedy in comparable cases in which the Board's remedy was limited to withholding recognition until certification by the Board in a representation proceeding?

Statutes Involved

The pertinent provisions of the National Labor Relations Act as amended, of the Federal Rules of Civil Procedure and of the Administrative Procedure Act are set forth in the Appendix, *infra.*

Statement of the Case

1. The Board's Complaint in these cases alleged certain acts of interference, domination of a labor organization (the Association) and discrimination. At the hearing, Blanche Gross was a major Board witness, both as to the Association and the alleged discrimination in the discharges of her husband and herself. (J. A. 85a-104a; 214a-229a; 244a-248a; 352a-354a). On cross-examination, counsel for petitioners, in starting to question this witness to impeach her credibility, asked her: "And after you terminated your employment with the Regal Shirt Company, did you make application for unemployment compensation?" (J. A. 244a). A bare objection by the Board's attorney was immediately sustained by the Trial Examiner. (J. A. 244a-245a). The record discloses an ensuing colloquy between petitioners' counsel and the Trial Examiner which makes

it abundantly clear that counsel sought to attack the credibility of this witness by showing different and contradictory testimony by her at another proceeding (J. A. 245a-248a); in fact, the Board so found (J. A. 410a, footnote 2, last sentence of first paragraph). In the course of this discussion the Trial Examiner said to petitioners' counsel: "You may make an offer of proof, if you wish", to which he replied "All right, sir" (J. A. 246a). However, the Trial Examiner precluded any offer of proof by ruling "*Well, if you are by way of making an offer of proof, it is rejected*". (J. A. 247a) (Emphasis Supplied). Toward the end of the colloquy, counsel asked: "You then are ruling that I may not attack the credibility of the witness?" Trial Examiner: "That's right". (J. A. 248a).

Following the Trial Examiner's Intermediate Report (J. A. 371a), petitioners filed with the Board, Exceptions, and later a Motion to Reopen the Hearing to introduce the impeaching testimony refused admittance by the Trial Examiner and newly discovered evidence on the credibility of the witness involved. (J. A. 406a). The Board denied this Motion in its Decision and Order; it found that the Trial Examiner had erred in his ruling, but that the error was "not prejudicial". (J. A. 410a, footnote 2).

The petitioners raised this question in the Court below, both in their brief (pages 12 and 13) and in their Petition for Rehearing[3] (pages 1-4). However, the Court of Appeals, in its *per curiam* opinion (Appendix, p. 24) held:

> "The question disallowed did not of itself indicate the nature of the impeachment sought and while it appears to have been based upon a document which was submitted to the trial examiner for his inspection, counsel for the respondents *failed to make an offer of proof* which disclosed its nature and contents sufficiently to enable the Board and this Court to determine

3. The Petition for Rehearing below is included in the certified proceedings in the Court of Appeals filed with this Petition for a Writ pursuant to Rule 21 (1) of the Revised Rules of this court.

the relevancy of the question". (Emphasis supplied).

The Court of Appeals in this connection concluded:

> "In any event, the failure of respondents' counsel *to disclose its details in an offer of proof* leaves this Court without any basis for holding that the Board erred in concluding that the trial examiner's action did not prejudice the respondent". (Emphasis Supplied).

The Court of Appeals said nothing in its *per curiam* opinion about the Trial Examiner's *express rejection* of the offer of proof shown by the record. The court denied without comment petitioners' Petition for Rehearing [4] in which this fact was emphasized and fully documented from the record.

2. The Board, in its order, found that the Association, a labor organization of employees of the petitioners, although previously certified by the Board following a representation election (J. A. 411a) was dominated by the petitioners (J. A. 411a-412a) and ordered its disestablishment. (J. A. 418a, paragraph (d)). The scope of the remedy in this connection was raised by petitioners in the court below, and in their brief, and in their Petition for Rehearing. The Court, in its *per curiam* opinion, dismissed this contention without discussion. (Appendix, p. 24).

3. Petitioners, in their brief in the lower court, raised a number of other contentions. These were dismissed by the Court in its *per curiam* opinion without discussion. (Appendix, p. 24). Petitioners, in their Petition for Rehearing, among other things, prayed that the Court of Appeals reconsider these contentions and make express and specific rulings and decisions on them, particularly their contention that the scope of the Board's remedy as to the Association was too drastic; and that the record as a whole was inadequate to support the Board's findings and order. The court denied this Petition without comment. (Appendix, p. 25).

---

4. See footnote 3, *supra*.

Specification of Errors to be Urged

The Court of Appeals erred:

1. In holding that the petitioners were not denied due process of law by the Trial Examiner's refusal to permit cross-examination of a major witness to impeach credibility where the record shows the Trial Examiner expressly rejected an offer of proof of the details of such expected evidence.

2. In holding that counsel for petitioners failed to make an offer of proof of the details of the evidence he sought to introduce to impeach credibility of a major witness on cross-examination where the record clearly shows such offer of proof and its express rejection by the Trial Examiner after the latter refused to permit such cross-examination.

3. In holding (*per curiam*, and without discussion) that the Board's findings are supported by substantial evidence on the record considered as a whole.

4. In failing to hold that the requirements of the Board's order for disestablishment of the Association exceeded the scope of the Board's remedy in comparable cases.

5. In enforcing the Board's order.

Reasons for Granting the Writ

The court below, in its decision, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The decision of the court below is in conflict with applicable decisions of this court.

The questions decided by the court below and presented in this petition are important questions of federal law which have not, but should be settled by this court.

The decision of the court below is in conflict with decisions of other courts of appeals on the same subject matter.

1. The right to cross-examination of adverse witnesses, particularly on credibility, is so accepted and usual in judicial proceedings, so fundamental in our system of law, that it should require no citation of authority. So is the right to make an offer of proof of testimony excluded on objection, to provide a record for a test of the correctness of the ruling in a reviewing court. The record in this case leaves no doubt that the evidence sought was material; the Board, in finding that the Trial Examiner erred in excluding the question stated "The Respondent, however, clearly intended to question the credibility of the witness". (J. A. 410a, footnote 2, first paragraph, last sentence). The record is also clear that petitioners tendered an offer of proof (J. A. 246a) and that this offer of proof was expressly rejected by the Trial Examiner. (J. A. 247a). Petitioners know of no way they could have gotten an offer of proof on the record over the *express rejection* by the Trial Examiner. There is no way known to petitioners to have *forced* such an offer of proof into the record. That is the reason the details of the proposed offer are not in the record—not the petitioners' *failure* to include them, but the Trial Examiner's *refusal.*

Petitioners submit that the court below erred in holding, in its *per curiam* opinion, that petitioners had not made an offer of proof.

In *N. L. R. B. v. Indiana & Michigan Electric Co.,* 318 U. S. 9, 28, this court (in remanding the case to permit the taking of rejected testimony) states:

> ". . . courts . . . are granted some discretion to see that the hearings . . . do not shut off a party's right to produce evidence *or conduct cross-examination material to the issue* . . . Findings cannot be said to have been fairly reached *unless material evidence which might impeach,* as well as that which will support its findngs, is heard and weighed". (Emphasis Supplied).

In *McCandless v. U. S.*, 298 U. S. 342, this court held that a trial court's exclusion of material evidence *and* rejection of an offer of proof of such relevant and competent evidence was denial of substantial rights. This court said, pp. 346 and 348:

> "An offer of proof cannot be deemed as remote or speculative because it does not cover every fact necessary to prove the issue. . . .
>
> * * * * * * * *
>
> ". . . To exclude from the consideration of the jury *evidence of this elementary character* could not be otherwise than prejudicial". (Emphasis Supplied).

Petitioners submit that the refusal of the Trial Examiner to permit cross-examination of a major witness on credibility *(certainly, evidence of an "elementary character")*, coupled with his rejection of an offer of proof of the expected testimony is so glaring a departure from and abuse of accepted and usual judicial proceedings and its sanction by the court below is such a denial of fundamental due process of law as to call for an exercise of this court's power of supervision.

2. The court below erred in sanctioning, in its *per curiam* opinion, the Board's finding that the Trial Examiner's action, while error, did not prejudice the petitioners. (Appendix, p. 24). The court below thus in effect sanctioned the Board's assertion that it relied on the testimony of the witness whose impeachment was precluded by the Trial Examiner's action to the extent that "it is either corroborated or uncontradicted and internally credible" (J. A. 410a, footnote 2, at 411a, last paragraph of footnote). The Board fails to point out where and how.

In *N. L. R. B. v. Indiana & Michigan Electric Co.*, *supra*, this court sustained the Court of Appeals in remanding the case for the taking of *material testimony to impeach major witnesses* for the Board, which had been rejected at

the hearing, and for taking additional testimony, sought for introduction by the company, *although the Board in that case (as in the instant case) contended that in its findings it did not rely entirely on the testimony of the witnesses sought to be impeached.* This court, in affirming the fundamental and "elementary" right to impeach by cross-examination in this case, as quoted above, also said, p. 28:

> "The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are foreclosed his case has been fairly heard".

In *McCandless v. U. S. supra*, this court found prejudicial error in the trial court's rejection of evidence of an "elementary character" coupled with the trial court's rejection of an offer or proof of such evidence.

Petitioners submit that the *per curiam* opinion of the court below is in conflict with applicable decisions of this court.

3. The court below erred in concluding, in its *per curiam* opinion, and without discussion, that the Board's findings are supported by substantial evidence on the record, considered as a whole, and in enforcing the Board's order. As pointed out above, the record was not "whole"; impeachment of a major witness was precluded by the action of the Trial Examiner, and by the action of the Board in refusing to reopen the record on petitioners' motion. (J. A. 410a, footnote 2); and, as pointed out above, the Trial Examiner precluded petitioners' efforts to make the expected impeaching testimony a part of the record by expressly rejecting petitioners' offer of proof.

The Administrative Procedure Act (Appendix, p. 20), expressly provides:

> Sec. 10(e) "Scope of review . . . the reviewing court . . . shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be

. . . (4) *without observance of procedure required by law;* . . ." (Emphasis supplied).

In *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, this court established standards to be followed by reviewing courts in considering decisions of the Board. This includes consideration of provisions of the Administrative Procedure Act, *supra.* As this Court, in the *Universal Camera case*, stated, p. *490:*

> "We conclude therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that the courts must now assume more responsibiilty for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeal. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both".

Petitioners most respectfully submit there is no magic in giving lip service to the bare formula "we have reviewed the record considered as a whole" where the record on its face shows that petitioners' case was not fully heard; that "procedure required by law" has not been followed; and where the standards for review established by this court have not been fulfilled.

Petitioners submit that the *per curiam* opinion of the

court below is in conflict with applicable decisions of this court as to what constitutes compliance with the standards for review set forth in this court's decisions and that this presents important questions of federal law which should be settled by this court.

4. The *per curiam* decision of the court below sustains the decision of the Board that the Trial Examiner's action in excluding impeaching evidence was "not prejudicial" error.

Section 10(b) of the Act provides, in regard to hearings on complaints of alleged unfair labor practices:

> "Any such proceeding shall, as far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C)."

Although not expressly cited by the Board or the Court of Appeals, the language, meaning and interpretation of Rule 43(c) (the "offer of proof" rule) and Rule 61 (the "harmless error" rule) of the Federal Rules of Civil Procedure, both set forth in Appendix, p. 21, are inevitably involved in the issues in the instant case. (Rule 61 was referred to in the Board's and in petitioners' briefs below).

Rule 43 (c) (Appendix, p. 21) provides that an offer of proof of the expected testimony may be made when an objection to a question is sustained. Where evidence is excluded, the examining party *is entitled* to make an offer of proof to preserve the question on appeal. *Downie v. Powers*, 193 F. 2d 760 (CA 10). Where the significance of the excluded testimony is not obvious or clear, an offer of proof must be made to preserve the question of exclusion for appeal. *Hoffman v. Palmer*, 318 U. S. 109, affirming 129 F. 2d 976 (CA 2); *Downie v. Powers, supra; Hawkins v. Mis-*

souri Pacific R. Co., 188 F. 2d 348 (CA 8); *Sorrels v. Alexander*, 142 F 2d 769 (CA D. C.).

However, *an offer of proof of the expected testimony is not an absolute condition to allege error in the exclusion on appeal where it is otherwise clear what the error is. Maguire v. Federal Crop Ins. Corp.*, 181 F. 2d 320 (CA 5), *and its exclusion probably affected substantial rights. Meaney v. U. S.*, 112 F. 2d 538 (CA 2). *In the Maguire and Meaney cases*, the evidence rejected was *rebuttal evidence*, in the *Meaney case* an admission to a physician by a deceased insured person as to the "history" of a relevant illness.

Rule 61 (Appendix, p. 21) provides that error in the admission or exclusion of evidence (among other errors) is not ground for disturbing a judgment or order *"unless . . . inconsistent with substantial justice"* and where the error or defect *"does not affect the substantial rights of the parties"*.

Rule 61 is in substance a restatement of former 28 U. S. C. Sec. 391 which applied the "harmless error" rule to civil and criminal cases. U. S. C. A., Rules, at Rule 61, p. 326, first footnote. See *University City, Mo., v. Home Fire & Marine Ins. Co.*, 114 F 2d 288, 295 (CA 8); and *Kotteakos v. U. S.*, 328 U. S. 750, 757, footnote 2.

In criminal cases, this statute was intended to end the situation in which criminal trials became a game of sowing reversible error in the record. *Kotteakos v. U. S. supra*, p. 759. The rule was intended only to affect technical errors. *Substantial rights are not to be prejudiced. Kotteakos v. U. S., supra*, and cases cited p. 757, footnote 8. However, "what may seem technical may embody a great tradition of justice", *Kotteakos v. U. S.*, p. 761. In *Bruno v. United States*, 308 U. S. 287, 294, this court said, (in regard to former 28 U. S. C. Sec. 391):

> "that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutae of procedure from touching the merits of a verdict".

In civil cases, in *University City, Mo., v. Home Fire & Marine Ins. Co., supra,* p. 295, the Court of Appeals, quoting from this court's decision in *Bruno v. United States, supra,* held that neither former 28 U. S. C. Sec. 391 nor Rule 61 "were intended to deprive a litigant of substantial rights in the trial of a case, civil or criminal".

In applying Rule 61 in civil cases, the Courts of Appeals have refused to reverse for errors found to be technical and not prejudicial. Thus, reversal was refused for errors in giving or refusing to give certain instructions to a jury where the charge was otherwise fair and correct, *Atlantic Coast Line R. Co. v. Burkett,* 192 F. 2d 941 (CA 5); or for error as to the timeliness of a motion or prolixity in a complaint, *DeSanta v. Nehi Corp.,* 171 F. 2d 696 (CA 2); *McCoy v. Providence Journal Co.,* 190 F. 2d 760, cert. den. 342 U. S. 894 (CA 1).

In regard to errors in *the admission or exclusion of evidence,* Rule 61 has been applied to preclude reversal, for the erroneous *admission* of evidence as to damages where the verdict was not excessive, *Mead v. Cochrane,* 184 F. 2d 579 (CA 7); *Woods v. Gettelfinger,* 108 F. 2d 549 (CA 5); or for the erroneous *exclusion* of evidence where other evidence to the same effect is in the record, *Virginia-Carolina Tie & Wood Co., Inc., v. Dunbar,* 106 F. 2d 383 (CA 4); or where the evidence offered adds nothing of persuasive value to the evidence in the record, *Balchunas v. Palmer,* 151 F. 2d 842 (CA 2). See also *Remington Rand, Inc., v. Societe, et al.,* 188 F 2d 1011, cert. den. 342 U. S. 832 (CA D. C.); *Hoag v. City of Detroit* 185 F. 2d 764 (CA 6), (Rule 61 applied generally without specification of nature of evidence in issue).

However, where evidence erroneously *admitted* was given emphasis before the jury, the error was held *not harmless* under Rule 61, *University City, Mo., v. Home Fire & Marine Ins. Co. supra. Further, exclusion of evidence bearing on credibility has been held prejudicial error under Rule 61.* Thus, exclusion of competent rebuttal evidence was held to have "probably affected the substantial rights of the

parties", *Meaney v. U. S., supra;* and exclusion of evidence to explain an admission against himself (in a schedule of liabilities in his bankruptcy) was held prejudicial error under Rule 61, *Commercial Banking Corp. v. Martel*, 123 F 2d 846 (CA 2); and exclusion of the deposition of injured deceased as to the time of an alleged warning in a negligence case (where other evidence on this issue is contradictory) was held to be prejudicial error under Rule 61. *Cervin v. W. T. Grant Co.*, 100 F 2d 153 (CA 5). See also, *Maguire v. Federal Crop Ins. Corp., supra,* (exclusion of rebuttal evidence held prejudicial in absence of offer of proof; Rule 61 not cited).

From this summary of the decisions of the Courts of Appeals under Rules 43(c) and 61, it appears that the decision of the court below is in conflict with a number of decisions of other courts of appeals on the same subject matter.

Thus, under Rule 43(c) the Court of Appeals for the Tenth Circuit in the *Downie case*, supra, has held that the examining party *is entitled* to make an offer of proof to preserve the question on appeal, contrary to the decision of the Third Circuit Court below which in effect sanctions the Trial Examiner's express rejection of the offer of proof. Further, the Courts of Appeals for the Second and Fifth Circuits have held, contrary to the effect of the decision of the Third Circuit Court below, that an offer of proof is not an absolute condition to allege error in the exclusion of testimony where it is otherwise clear what the error is. *Maguire and Meaney cases, supra.* In the instant case, the record is undisputable as to what was intended—the impeachment of a major witness—and the Board in finding the Trial Examiner erred, so admitted. Moreover, in the instant case, *an offer of proof for the record was made*, and was expressly rejected by the Trial Examiner; and the Board refused petitioners' request to correct the error by denying their motion to reopen the hearing.

Under Rule 61, the cases where the rule was applied

to find harmless error all involve obvious minor technicalities, matters of "etiquette" and "formalities", the smaller amenities of procedure, or cases involving admission or exclusion of patently harmless or cumulative evidence. The Courts of Appeals for the Second, Fifth and Eighth Circuits have held, contrary to the decision of the Third Circuit Court below in the instant case, that erroneous rulings on evidence, including erroneous exclusion of evidence bearing on credibility, *do affect substantial rights* and are prejudicial. *University City, Mo.; Commercial Banking; Meaney; Cervin;* and *Maguire cases, supra.*

In *Hoffman v. Palmer, supra,* decided by this court, petitioners, on cross-examination of a witness, requested production of a document containing an impeaching statement made by the witness. The trial court said that if produced, he would admit the document in evidence. Petitioner did nothing further in the matter, and *made no attempt to make an offer of proof.* The factual difference in this and the instant case is clear. In the instant case the purpose and nature of the excluded testimony was unmistakeable from the record, and the Board in finding the Trial Examiner erred, so admitted; *and* in the instant case, petitioners *did* make an offer of proof which the Trial Examiner expressly rejected.

The only case petitioners have found in the decisions of this court exactly like the instant case, where an erroneous exclusion of material evidence *was coupled* with a rejection of an offer of proof of such expected evidence is *McCandless v. U. S., supra,* where this court, referring to former 28 U. S. C. sec. 391, held that exclusion of material evidence (bearing on market value of land in a condemnation proceeding) *combined* with rejection of an offer of proof (which the government alleged in its argument to be insufficiently specific) was prejudicial error affecting substantial rights.

Petitioners submit that the facts in the instant case are like those in *McCandless v. U. S.* and *not* like the facts in the *Hoffman case.*

Petitioners submit that the problem of offers of proof of rejected testimony under Rule 43 (c), and the problem of "harmless" or prejudicial error and protection of substantial rights in civil cases under Rule 61, particularly as they concern admission or exclusion of evidence in proceedings of administrative agencies, is an important issue of federal law on which there is conflict in the courts of appeals dealing with the question. This issue has not been, but should be, settled by this court.

5. The court below erred in enforcing that portion of the Board's order which requires disestablishment of the Association, a labor organization of employees of the petitioner. In a number of closely comparable cases, *in which the complaint alleged domination* of a named labor organization under Section 8 (2) of the Wagner Act or Section 8 (a) (2) of the Act as amended, the Board, on the basis of findings of employer assistance like the findings in the instant case, ordered, instead of the capital and lethal remedy of disestablishment, a remedy of withdrawal of recognition until certification by the Board in a representation proceeding.

Thus, the Board so limited the remedy, where the complaint alleged "domination", on such findings of assistance, in: *Ephraim Haspel*, 109 NLRB No. 8, 34 LRRM 1280 (use of employer premises; payment for time to consult attorneys; posting of notices; prompt recognition); *Valentine Sugars, Inc.*, 102 NLRB 313, (meetings and suppers on employer premises; providing transportation to and payment for time to visit NLRB regional office; payment for time spent at meetings and in bargaining conferences); *Fairfield Engineering Company*, 74 NLRB 827 (Association suggested by employer; expressions of favor and preference by employer; organizational activities on employer property and time; meetings on employer property; granting of vending concession); *LaSalle Steel Company*, 72 NLRB 411 (expressions of hostility for outside

union and preference for Association; posting of notices); *Winona Knitting Mills, Inc.*, 67 NLRB 1, (favoring Independent and expressions of hostility to outside union; Independent petition and handbills freely circulated in plant; posting notices; meetings on employer property and time); *Electric Stop Nut Corp.*, 51 NLRB 694 (expressions of preference; organizing activities in plant and on employer's time; posting notices of meetings; distribution of handbills; collection of dues; recognition of and contract with Association in face of outside union's claim).

In the instant case, the Board's findings on which its order to disestablish is based, comprise granting of recognition; permission to use company time and property for Association purposes denied to the outside union; permission to use a company car for transportation on company time; expressions and acts of favoritism (J. A. 412a, 413a). It should be noted that in the instant case the Association was certified by the Board following a representation election *between the Association and the charging union*, conducted in May, 1951; the Board's certification of the Association in June 1951, preceded the filing of the charges in the instant case by the losing union (J. A. 379a).

Petitioners submit that the Board's findings in the instant case are closely comparable and hardly distinguishable from the findings in the Board decisions cited. Yet in those cases the Board's remedy was limited to withdrawal of recognition of the "assisted" labor organization until certified, while in the instant case the Board ordered its annihilation by disestablishment, and the court below enforced the order.

Petitioners submit that the remedy in this type of case should not be left to a sort of "size-of-the-chancellor's-foot" equity doled out by the Board, but should be uniform and consistent in comparable cases. Petitioners submit that the number of cases involving charges of domination of a labor organization and the remedy in such cases is not negligible. Petitioners submit that the problem of the

scope of the remedy in such cases is an important issue of federal law which should be settled by this court.

Conclusion

Because of the reasons stated, petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

REGINALD S. HEMINGWAY,
238 Market Street,
Bloomsburg, Pa.,
Counsel for Petitioners.

JOHN F. DUMONT,
Stanton Building,
Little Falls, N. J.,
Counsel for Petitioners.

September, 1954.

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 141, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

* * * * * * * *

Sec. 8 (a). It shall be an unfair labor practice for an employer—

* * * * * * * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (b). . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C) . . .

* * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the Dis-

trict of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . .

2. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. Sec. 1001, *et seq.*) are as follows:

Sec. 10 (e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, . . . It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be . . . (4) without observance of procedure required by law; . . .

3. The relevant provisions of the Federal Rules of Civil Procedure (28 U. S. C., foll. Sec. 2072) are as follows:

Rule 43. *Evidence.*

* * * * * * * *

(c) *Record of Excluded Evidence.* In an action tried by jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

* * * * * * * *

Rule 61. *Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court in every stage of the proceeding must disregard any error or defect which does not affect the substantial rights of the parties.

4. The "Harmless Error Statute" (40 Stat. 1181, former 28 U. S. C. Sec. 391) is as follows:

On the hearing of any appeal, certiorari or motion for a new trial, in any cases, civil or criminal, the

court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

5. The statutory provisions governing the time for filing a petition for a writ of certiorari (62 Stat. 961, 28 U. S. C., Sec. 2101 (c)) are as follows:

> Section 2101 (a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title . . . shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. . . .
>
> * * * * * * * *
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

6. The opinion, order denying rehearing and decree in the court below (all included in the certified proceedings below filed with this Petition) are as follows:

Opinion

[CAPTION]

ON PETITIONS FOR ENFORCEMENT AND REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued May 6, 1954

Before MARIS, KALODNER and HASTIE, Circuit Judges.

OPINION OF THE COURT

(Filed May 18, 1954)

PER CURIAM: This is a petition by the National Labor Relations Board to enforce an order directing the respondents to cease from certain unfair labor practices, to reinstate two former employees with back pay, to make whole in pay eight other employees and to withdraw recognition from the Bloomsburg Independent Garment Workers Association as bargaining agent for their employees and disestablish the Association. The order was based on the Board's findings that the respondents had violated Section 8 (a) (1) of the National Labor Relations Act by acts of surveillance and by threatening their employees about union activities, that they had violated section 8 (a) (1) and (2) of the Act by forming, assisting and dominating the Association, and that they had violated section 8 (a) (1) and (3) of the Act by discriminatorily transferring, laying off or discharging the ten employees referred to in the order.

The respondents and the Association, as intervenor, attack these findings as not supported by substantial evidence on the record, considered as a whole.

As to this contention it is sufficient to say that our examination of the record satisfies us that the Board's findings are adequately supported by the evidence.

The respondents urge that they were denied due process of law by the action of the trial examiner of the Board in refusing to permit the cross-examination of a Board's witness on a point which their counsel asserted was intended to impeach her credibility. The question disallowed did not of itself indicate the nature of the impeachment sought and while it appears to have been based upon a document which was submitted to the trial examiner for his inspection, counsel for the respondents failed to make an offer of proof which disclosed its nature and contents sufficiently to enable the Board and this court to determine the relevancy of the question. The Board held that the trial examiner erred in so limiting the cross-examination of a material witness. Nonetheless the Board concluded that the error was nonprejudicial and it refused the respondents' motion to reopen the hearing so as to permit the cross-examination. The trial examiner, who saw the document, apparently did not think that it would impeach the witness' credibility. In any event the failure of respondents' counsel to disclose its details in an offer of proof leaves this court without any basis for holding that the Board erred in concluding that the trial examiner's action did not prejudice the respondents. Accordingly we cannot so hold.

The remaining contentions of the respondents are so wholly lacking in merit as to require no discussion.

A decree enforcing the order of the Board will be entered.

A true copy: Teste: Clerk of the United States Court of Appeals for the Third Circuit.

Order Denying Petition for Rehearing:

[CAPTION]

SUR PETITION FOR REHEARING

Present: MARIS, KALODNER and HASTIE, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled cases is hereby denied.

BY THE COURT

June 16, 1954

MARIS
Circuit Judge.

Decree:

[CAPTION]

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: MARIS, KALODNER and HASTIE, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 18, 1953, and upon a petition of Milco Undergarment Co., Inc., and Bloomsburg Braiding Corporation, dated March 13, 1954, for review of the Board's Order. The Court heard argument of respective counsel on May 6, 1954, and has considered the briefs and the transcript of record filed in this cause. On May 18, 1954, the Court, being fully advised in the premises, handed down its decision enforcing the Board's Order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that Milco Undergarment Co., Inc., and Bloomsburg Braid-

ing Corporation (hereinafter called the Companies), Bloomsburg, Pa., their officers, agents, successors, and assigns shall:

1. Cease and desist from: . . .

* * * * * * * *

(d) Dominating and interfering with the formation or administration of the Bloomsburg Independent Garment Workers' Association or any other labor organization of their employees and from contributing support to it or to any labor organization of their employees; . . .

* * * * * * * *

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act: . . .

* * * * * * * *

(c) Withdraw all recognition from Bloomsburg Independent Garment Workers' Association as a representative of any of their employees for the purposes of dealing with the Companies concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and completely disestablish said organization as such representative;

* * * * * * * *

BY THE COURT

DATED: July 14, 1954

KALODNER,
Circuit Judge.

7. The ruling of Justice Jackson on petitioners' application for a grant and extension of time, filed to make certain whether the time for filing this Petition began to run from the date of the entry of the decree by the Court

of Appeals on July 14, 1954, is set forth in a letter from the Clerk of this court, dated August 18, 1954, as follows:

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

August 18, 1954

John F. Dumont, Esquire
Little Falls, New Jersey.

Re: Milco Undergarment Co., Inc.
Bloomsburg Braiding Corporation.

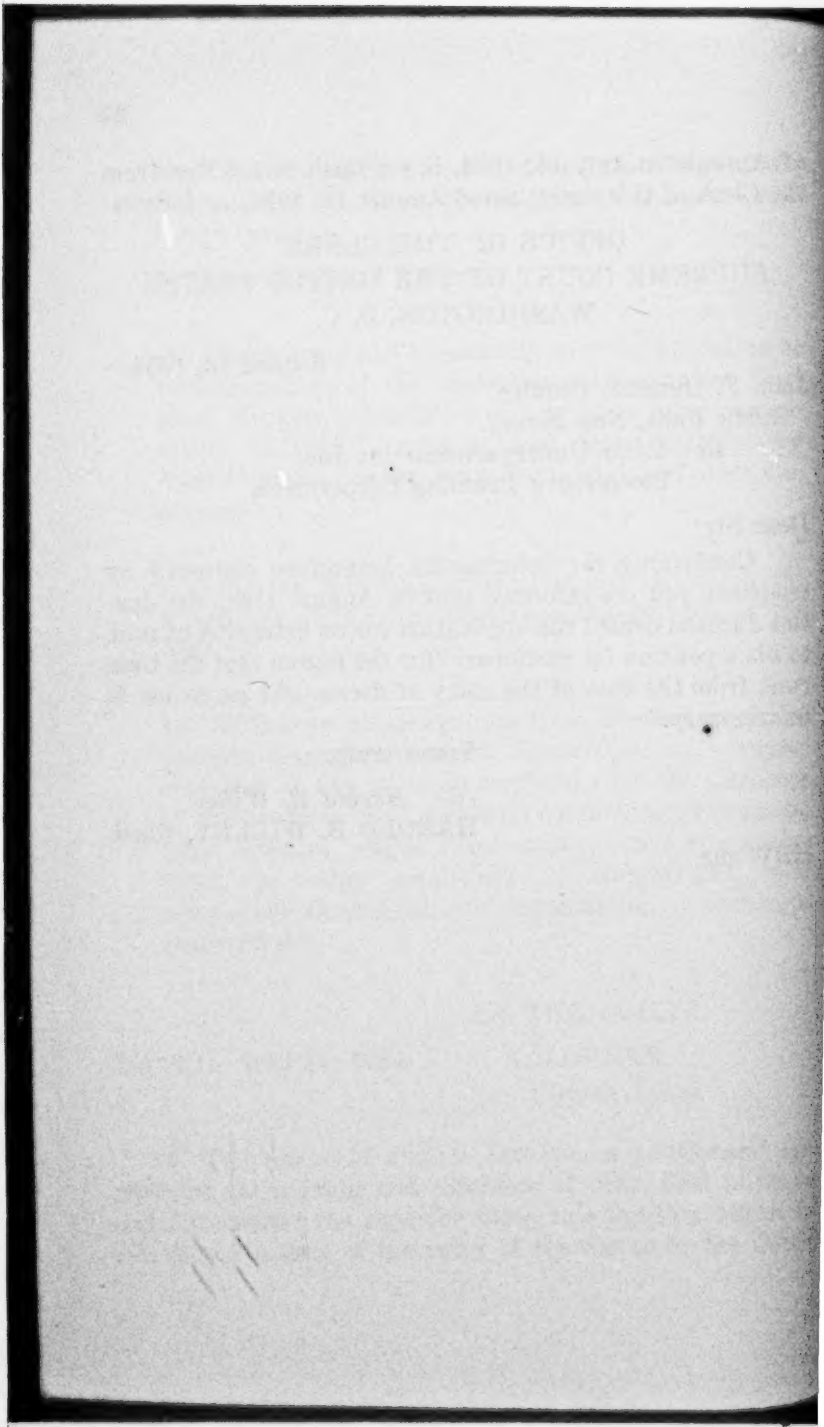
Dear Sir:

Confirming the information heretofore conveyed by telephone you are informed that on August 11th, Mr. Justice Jackson denied the application for an extension of time to file a petition for certiorari "for the reason that the time runs from the date of the entry of decree and extension is unnecessary."

Yours truly,

/S/ *Harold B. Willey*
HAROLD B. WILLEY, *Clerk*

HBW:mr



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

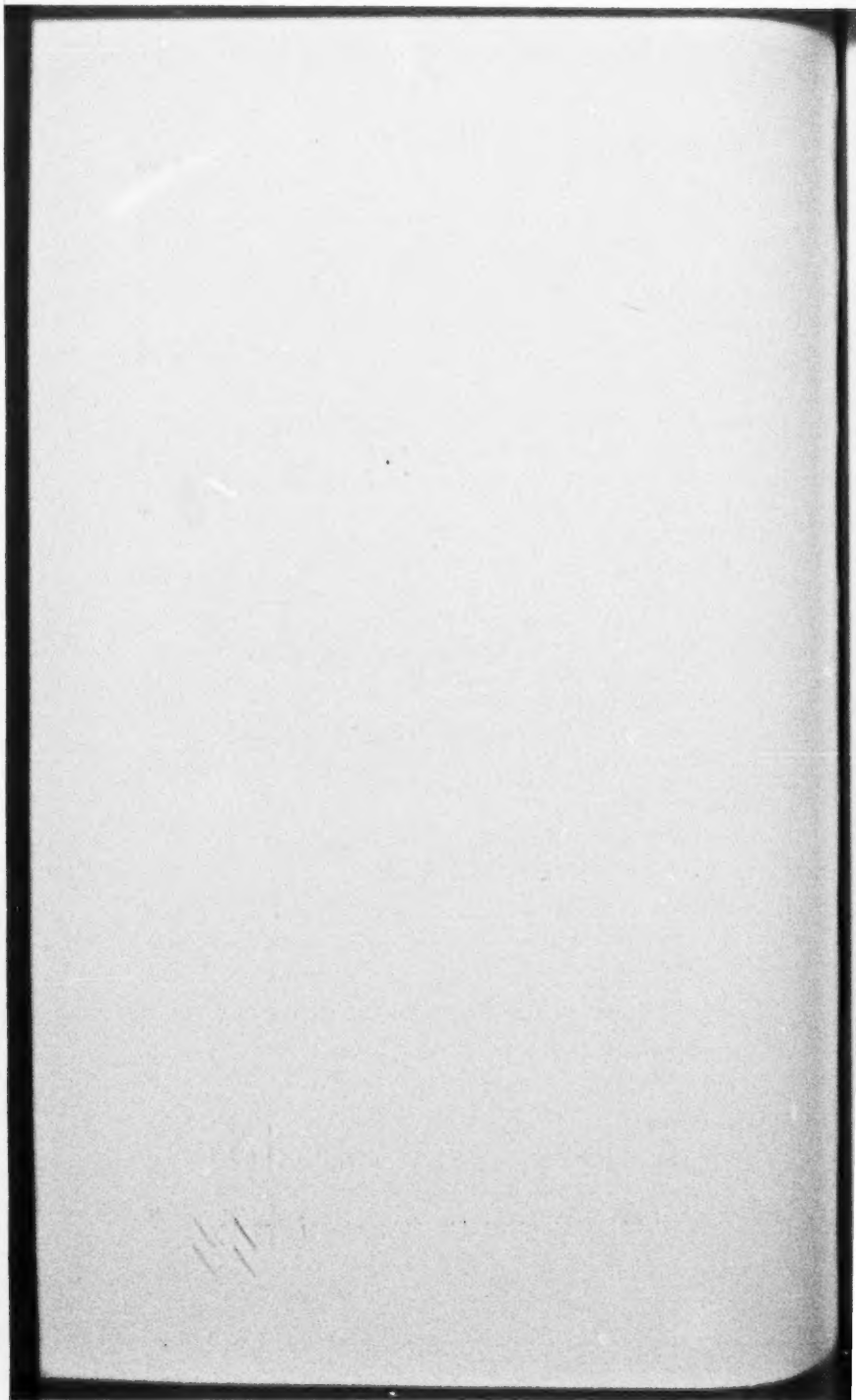
Carpenter Steel Co., 76 NLRB 670	11
Clover Fork Coal Co. v. *National Labor Relations Board*, 97 F. 2d 331	9
Herencia v. *Guzman*, 219 U.S. 44	9
Meany v. *United States*, 112 F. 2d 538	11
National Labor Relations Board v. *Carpet L. & R. T. Layers Union*, 213 F. 2d 49	9
National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U.S. 9	9, 10
Pacific Mills, 102 NLRB 385	10
Palmer v. *Hoffman*, 318 U.S. 109, affirming 129 F. 2d 976	9, 10, 11

Statutes and Rules:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	2, 5
Section 8(a)(2)	2, 5
Section 8(a)(3)	2, 5
Federal Rules of Civil Procedure:	
Rule 43(c)	9
Rule 61	9

Miscellaneous:

Goldstein, *Trial Technique* (1935) p. 361	10
Wigmore, *Evidence* (3rd ed.) Vol. 1, Sec. 20, p. 357	9



In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 396

MILCO UNDERGARMENT CO., INC. AND BLOOMSBURG BRAIDING CORP., PETITIONERS

v.

NATONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App., pp. 23-24) is reported at 212 F. 2d 801. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 409a-421a, 371a-405a) are reported at 106 NLRB No. 125.

JURISDICTION

The judgment of the court below was entered on July 14, 1954 (Pet. App., pp. 25-26). The petition for writ of certiorari was filed on October 8, 1954.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. The Board's trial examiner refused to permit petitioners to cross-examine a witness with respect to matters alleged to impeach her credibility and the Board concluded that the examiner's ruling, although erroneous, had not prejudiced petitioners. The first question is whether the court below properly held that there was no basis for holding that the Board had committed prejudicial error in view of petitioners' failure to complete an offer of proof of the alleged impeaching evidence.[1]

2. Whether the Board's order requiring petitioners to disestablish a union which the Board found had been dominated by petitioners was proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix to the petition for certiorari (pp. 19-20).

STATEMENT

A. The Board's Findings of Fact and Conclusions of Law

Briefly, the Board found that petitioners, in violation of Section 8(a)(1), (2) and (3) of the Act,

[1] Petitioners' question No. 2—whether the order is supported by substantial evidence on the record as a whole—is predicated on the claim that the trial examiner's exclusion of the "impeaching" testimony rendered the record incomplete (Pet. p. 9). This question is therefore comprehended in our question No. 1.

restrained and coerced their employees in the exercise of their rights under the Act; dominated, interfered with and supported the Bloomsburg Independent Garment Workers Association (hereafter referred to as "the Independent"); and discriminated against ten employees because of membership in and activities in behalf of the International Ladies Garment Workers' Union, Local 225, AFL (hereafter referred to as "the Union"). The subsidiary facts upon which the Board based its findings may be summarized as follows:

1. *The unfair labor practices.*—The Independent was originally created and formed at the Milco plant by direction of Marco Mitrani, president of Milco, in 1937, at the time when a CIO union was trying to organize his employees (R. 375a; 48a-49a, 74a, 82a, 139a). It functioned briefly and then became dormant until the fall of 1950 when it was revived, again at President Mitrani's direction (R. 375a-376a; 48a-49a, 76a, 80a, 86a-87a, 140a).

Shortly after the revival of the Independent, petitioners recognized it and agreed to a check-off of union dues without requiring proof of its majority status (R. 337a; 51a, 58a, 76a, 236a, 238a-239a). Thereafter the Independent met with President Mitrani to negotiate an agreement (R. 377a; 51a, 88a-89a, 107a). However, Mitrani steadfastly refused to sign a contract at that time and in March 1951 the employees decided to secure their bargaining objectives through the Union (R. 378a; 57a, 89a, 107a, 215a).

Thereafter petitioners sought to thwart the

Union's organizational drive and simultaneously took steps to strengthen the Independent. Thus on March 27, President Mitrani agreed to grant the employees paid holidays, a benefit repeatedly requested by the Independent but theretofore refused (R. 378a; 57a, 89a, 94a-95a, 108a). He threatened Blanche Gross, one of the active Union adherents, with discharge if she resigned as treasurer of the Independent (R. 378a; 91a). He reprimanded James Mott, another employee, for attending Union meetings and then arranged that Mott continue to go to the meetings for the purpose of spying on the employees' activities (R. 380a-381a, 413a; 21a-28a, 31a). On one occasion Mitrani also reprimanded the officers of the Independent for allowing Union representatives to speak at an Independent meeting (R. 378a, 413a; 91a). Finally, he called two meetings of his employees in the course of one of which he warned that he would never recognize an "outside union" and before he would negotiate with one he would "close the mill" and retire (R. 381a; 93a, 148a-149a).

In May 1951, a Board-conducted election was scheduled to be held at the Milco plant, both the Independent and the Union being on the ballot (R. 329a; 38a). During the period preceding the election, petitioners intensified their campaign to secure votes for the Independent and assisted it in numerous ways including, among other things, instructing various employees to enlist supporters for the Independent, paying for the Independent's campaign buttons, and permitting the Independent

to make use of company time and facilities while denying similar privileges to the Union (R. 378a-379a). The Union lost the election to the Independent and the Independent was thereafter certified by the Board (R. 379a; 52a-53a).

In March, 1951, two months before the election, President Mitrani had told his employees that bad business conditions forced him to put the plant into part-time operation (R. 92a). Although he then assured employees that the "outside union" was not involved in this decision and although petitioners did undergo a slack period in the spring and summer of 1951, the Board found, for reasons set forth at length in its decision (R. 414a-415a, 384a-396a), that petitioners seized upon the occasion of the layoff to discriminate against ten employees because of their activites in behalf of the Union by discharging two of them, by extending the period of layoff of five, and by transferring to less desirable positions three others (R. 382a-396a, 413a-415a).

Upon the foregoing facts the Board concluded (R. 411a-415a, 379a-400a) that petitioners violated Sections 8(a)(1), 8(a)(2), and 8(a)(3) of the Act by threatening their employees about union activities and spying on those activities; by assisting, dominating and interfering with the administration of, the Independent; and by discriminating against the ten employees because of their membership in, and activities in behalf of, the Union. Accordingly, the Board ordered that petitioners cease and desist from the specified unfair labor practices; reinstate with back pay the two employees dis-

charged discriminatorily; make the remaining eight discriminatees whole for losses sustained because of petitioners' discrimination against them; withdraw recognition from and completely disestablish the Independent; and post appropriate notices (R. 416a-419a).

2. *The facts relating to petitioners' procedural contention.*—On cross examination Blanche Gross, one of the witnesses for the General Counsel, and one of the employees found by the Board to have been discriminatorily discharged, was asked the following question by petitioners' counsel (J. A. 244a):

> And after you terminated your employment with the Regal Shirt Company [the company where Mrs. Gross obtained employment after her discriminatory discharge by petitioners], did you make application for unemployment compensation?

After the trial examiner sustained an objection to the question by the General Counsel, petitioners' counsel explained that the purpose of the question was to impeach the credibility of the witness by establishing a prior inconsistent statement on a document filed by the witness with the unemployment compensation authorities (R. 245a). The trial examiner then ruled that "a prior contradictory statement" would be relevant to the issue of credibility and stated: "You may make an offer of proof, if you wish, and if in that offer of proof I see something that is material, I may change my ruling"

(R. 246a). Thereafter petitioners' counsel permitted the trial examiner to inspect the document, and the examiner made the following ruling (R. 247a):

> Well, if you are by way of making an offer of proof, it is rejected. I see nothing in here which would cause me to reverse my ruling.

Petitioners' counsel excepted to this ruling without, however, requesting that the document be marked and received as a rejected exhibit. Nor did counsel offer to disclose the details of the document on the record.

On June 18, 1953, following the issuance of the Intermediate Report in which the trial examiner found petitioners guilty of most of the allegations alleged in the complaint, petitioners filed a motion to reopen the record for the purpose of receiving, among other things, the alleged contradictory statements made by Mrs. Gross in the unemployment compensation hearing (R. 406a-408a). Petitioners again failed to disclose the nature of the contradictory statements in the form of a document or otherwise (*ibid.*). Rejecting the motion, the Board in its Decision and Order held that while the trial examiner "erred in refusing to permit Company counsel to develop this line of inquiry," the error was not prejudicial (R. 410-411, n. 2). The Board specifically stated that it was relying on the testimony of Mrs. Gross "only to the extent that it is either corroborated or uncontradicted and internally credible" (*ibid.*).

On December 23, 1953, the Board denied a petition for reconsideration filed by petitioners on December 18, 1953.

B. The Decision of the Court Below

The court below enforced the Board's order in full (Pet. App. pp. 23-26). In a *per curiam* opinion, the court stated that "the record satisfies us that the Board's findings are adequately supported by the evidence" (Pet. App., p. 24). Rejecting petitioners' procedural contention, the court said (*ibid*):

> The question [addressed to Mrs. Gross on cross examination] did not of itself indicate the nature of the impeachment sought * * * counsel for [petitioners] failed to make an offer of proof which disclosed its nature and contents sufficiently to enable the Board and this court to determine the relevancy of the question. * * * The trial examiner, who saw the document apparently did not think it would impeach the witness' credibility. In any event the failure of [petitioners'] counsel to disclose its details in an offer of proof leaves this court without any basis for holding that the Board erred in concluding that the trial examiner's action did not prejudice the [petitioners]. Accordingly we cannot so hold.

ARGUMENT

1. The decision of the court below (Pet. App., p. 24) that petitioners' failure to disclose the de-

tails of the alleged impeaching statement left it "without any basis for holding that the Board erred in concluding that the trial examiner's action did not prejudice [petitioners]" is clearly correct. "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners." *Palmer* v. *Hoffman*, 318 U. S. 109, 116.[2] The lack of prejudice to petitioners is further emphasized by the fact that the Board, as it expressly stated (R. 411a, n. 2), did not rely on the testimony of the witness in question in any material respect except only to the extent that it was "either corroborated or uncontradicted and internally credible * * *." Cf. Rule 61 of the Federal Rules of Civil Procedure; *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. 2d 331, 335 (C. A. 6); *National Labor Relations Board* v. *Carpet L. & R. T. Layers Union*, 213 F. 2d 49, 53 (C. A. 10).[3]

Petitioners' assertion (Pet. pp. 7, 8, 9) that the trial examiner precluded them from making a record of the excluded document so as to permit the Board or a reviewing court to test the correctness

---

[2] See also Rule 43(c) of the Federal Rules of Civil Procedure (Pet. App., p. 21); *Herencia* v. *Guzman*, 219 U.S. 44, 46; Wigmore, *Evidence* (3rd ed.) Vol. 1, Sec. 20, p. 357.

[3] *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, relied on by petitioners (Pet. pp. 8-9) is distinguishable on the facts. There the Court pointed out that the Board "has made no finding that any specific parts of it [the testimony of the witness sought to be impeached] were not relied upon" (318 U.S. at pp. 13, 15, 20).

of his ruling is without merit. As the colloquy between the trial examiner and petitioners' counsel shows (*supra*, pp. 6-7), the trial examiner's statement to petitioners' counsel that "if you are by way of making an offer of proof, it is rejected" amounted to no more than an affirmance of his prior ruling that the proffered document which he had just inspected was immaterial to the issue of credibility because it contained nothing inconsistent with the witness' testimony. It was thereafter incumbent upon petitioners, if they wished to preserve the issue, to make an offer disclosing the contents of the alleged impeaching statement either by offering, as permitted under Board practice, to introduce the document as a rejected exhibit or, at least, by making a summary of its contents. *Palmer* v. *Hoffman*, 318 U. S. 109, 116; *Pacific Mills*, 102 NLRB 385. "Mere conversation between court and counsel does not constitute an offer of proof" [citing cases]. Goldstein, *Trial Technique* (1935), p. 361.[4]

None of the cases cited by petitioners (Pet. pp. 8-15) is in conflict with the decision below. The cases cited involved offers of proof which either

---

[4] Throughout the proceeding, petitioners persistently avoided disclosure of the contents of the proffered document. They failed to reveal its substance both in their motion to the Board to reopen the hearing and in their subsequent petition for reconsideration (R. 406a-408a). Nor did they file a motion with the court of appeals to reopen the record for the purpose of receiving the document pursuant to Section 10(e) of the Act. Cf. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9.

disclosed the substance of the precluded testimony or the "obvious * * * significance" thereof (*Hoffman* v. *Palmer,* 129 F. 2d 976, 994 (C. A. 2), affirmed, 318 U. S. 109, distinguishing *Meany* v. *United States,* 112 F. 2d 538 (C. A. 2), one of the cases relied on by petitioners).

The foregoing considerations also dispose of petitioners' ancillary contention (Pet. 9-11) that the record is incomplete by reason of the trial examiner's "exclusion" of the alleged impeaching testimony and that the decision below does not therefore rest on substantial evidence on the record as a whole.

2. Petitioners' contention (Pet. pp. 16-18) that the Board's order requiring disestablishment of the Independent is improper because the Board in "comparable cases" merely requires "withdrawal of recognition until certification by the Board," is wholly devoid of substance. Under the policy enunciated by the Board in *Carpenter Steel Co.,* 76 NLRB 670, 673, which petitioners do not challenge, the Board orders complete disestablishment where the labor organization is found to be employer-dominated, whereas it directs only withdrawal of recognition where the "employer's unfair labor practices were limited to interference and support and never reached the point of domination." Since the Board in the instant case found that petitioners dominated the Independent, a finding upheld by the court below, the disestablishment order accords with its established policy. None of the Board cases cited

by petitioners is in point for in those cases, unlike the instant one, the Board merely found interference and support, short of domination.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

SAMUEL M. SINGER,
Attorney,
National Labor Relations Board.

NOVEMBER 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 920320 893

39/23

No. 396

FILED
NOV 17 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

MILCO UNDERGARMENT CO., INC.

AND

BLOOMSBURG BRAIDING CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS TO THE OPPOSING BRIEF OF THE RESPONDENT

REGINALD S. HEMINGWAY,
238 Market Street,
Bloomsburg, Pa.,
Counsel for Petitioners.

JOHN F. DUMONT,
Stanton Building,
Little Falls, N. J.
Counsel for Petitioners.

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

SUBJECT INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Specification of Errors to Be Urged	1
Questions Presented	2
Statement of the Case	2
Argument in Reply	3
A. Denial of Due Process of Law	3
B. Scope of the Board's Findings and Remedy Regarding the Association	10
Conclusion	13

CASES CITED

Carpenter Steel Co., 76 N.L.R.B. 670	10, 11
Clover Fork Coal Co. v. N.L.R.B., 97 F. 2d 331 (CA 6)	9
Downie v. Powers, 193 F. 2d 760 (CA 10)	8
Herencia v. Guzman, 219 U. S. 44	9
Maguire v. Federal Crop Ins. Corp., 181 F. 2d 320 (CA 5)	9
McCandless v. U. S., 298 U. S. 342	3
Meaney v. U. S., 112 F. 2d 538 (CA 2)	9
N.L.R.B. v. Carpet, etc., Layers Union, 213 F. 2d 49 (CA 10)	10
N.L.R.B. v. Indiana & Michigan Electric Co., 318 U. S. 109	6, 7
Pacific Mills, 102 N.L.R.B. 385	8

CASES CITED—(*Continued*)

PAGE

Palmer v. Hoffman, 318 U. S. 9, affirming 129 F. 2d 976 (CA 2) 7

Sears, Roebuck & Co., 110 N.L.R.B. No. 30, 34 L.R.R.M. 1630 12

STATUTES

National Labor Relations Act (49 Stat. 449, 29 U.S.C. Sec. 151, *et seq.*)

Section 10(e) 9

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 141, *et seq.*)

Section 10(b) 2

Section 10(c) 11

Section 10(e) 9

Federal Rules of Civil Procedure:

Rule 43(c) 8

Rule 61 8

IN THE

Supreme Court of the United States

October Term, 1954

No. 396

MILCO UNDERGARMENT CO., INC.

and

BLOOMSBURG BRAIDING CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS TO THE OPPOSING BRIEF OF THE RESPONDENT

Opinions Below; Jurisdiction; Statutes Involved; Specifications of Errors to be Urged.

The opinions below; the grounds for invoking jurisdiction of this court; the statutes involved; and the specification of errors to be urged are cited and set forth in the petition for certiorari and its appendix (pp. 2, 3, 6, 23-27).

Questions Presented

The petitioners do not accept the respondent's statement of the questions presented in this case as they appear in respondent's opposing brief, page 2. This statement is more argument than question. Respondents rely on the statement of the questions presented as set forth in their petition for certiorari, pages 2 and 3.

Statement of the Case

The petitioners do not accept the respondent's statement of the case, particularly the respondent's inclusion, on pages 3 and 4 of the opposing brief, of its version and its summary of alleged conduct occurring *before January 25, 1951.* The Board, in its decision, carefully modified the Trial Examiner's findings in respect to the question of assistance to the Association, to limit and base its findings "on conduct occurring between January 25, 1951 (the date six months before the filing of the original charge) and June 4, 1951, the date of the certification". (J. A., p. 412a). In doing so, the Board followed the express requirement of the National Labor Relations Act, as amended, 49 Stat. 449, at Section 10 (b), 29 U. S. C. Sec. 160 (b), which provides that ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .". After this careful adherence in its decision in this case to the express limitation in the statute, the Board's inclusion in its statement of the case of a summary of alleged conduct occurring in 1937 and in 1950 or at any time more than six months before the date of the filing of the charge in this case, is, to put it mildly, highly irrelevant. Petitioners respectfully pray that these irrelevant allegations be disregarded.

In addition, respondent, in its summary of the record relating to petitioners' due process of law contention, stops short at the point where the Trial Examiner rejected respondent's offer of proof (Opp. Br., p. 4). Respondent fails to include a concluding statement of the Trial Examiner: "Mr. Dumont: You are then ruling that I may not attack the credibility of the witness?" "Trial Examiner: That is right" (J. A. 248a; Pet. p. 4).

The record is before the court and speaks for itself. The petitioners object to and refuse to accept the respondent's irrelevant and incomplete statement of the case.

Argument in Reply

A. Denial of Due Process of Law.

The petitioners respectfully contend that the opposing brief of the respondent fails to meet or to answer their contentions and argument in the petition for a writ or the authorities cited and quoted therein. The arguments attempted by the respondent are not applicable to the facts relevant to the issues in this case, and the authorities it cites are clearly distinguishable.

1. The respondent, in its opposing brief, does not challenge (or even mention) the decision of this court in *McCandless v. U. S.*, 298 U. S. 342, cited and quoted in the petition for a writ (Pet. pp. 8, 9, 15). In that case this court expressly decides that exclusion of material evidence of an "elementary character", *coupled* with rejection of an offer of proof of such expected testimony, is prejudicial error. The decision of the court below in the instant case is in conflict with this decision.

2. The respondent cannot evade the basic fact unmistakably disclosed by the record that the petitioners' counsel *did make an offer of proof* of the expected testimony on the credibility of a major witness for the Board, *and*

that the Trial Examiner *expressly rejected this offer of proof*.

The respondent, in its opposing brief, makes a fantastic attempt to characterize the Trial Examiner's action as a ruling that the "proffered document" was "immaterial on the issue of credibility" because it contained nothing inconsistent with the testimony of the witness (Opp. Br. p. 10; emphasis supplied); and that the plain record of the repeated and determined efforts of petitioners' counsel to place on the record an offer of proof of the expected impeaching testimony *including* the document in question was merely "conversation between court and counsel".* (Opp. Br. p. 10).

This fantastic argument does violence to the plain meaning of plain words on the record. (J. A. 244a-248a). Further, it attempts to disregard the Board's own finding in its Decision in this case, that the Trial Examiner's *entire action* was error. (J. A. 410a, footnote 2).

The record plainly shows that immediately after the Trial Examiner's ruling sustaining the bare objection of the Board's attorney to the initial question relating to the credibility of the witness, counsel for the petitioners referred to the document in question and clearly stated its import on the credibility of the witness (J. A. 245a). The Examiner at first attempted to justify his ruling on the ground that the expected questioning on credibility went beyond the scope of direct examination (J. A. 245a). Respondents' counsel argued that on cross-examination on credibility he could go beyond the scope of direct examina-

* To support this contention, the opposing brief quotes a 1935 handbook on Trial Technique, "(citing cases)". The cases cited in this treatise are four decisions in State courts, one of them an intermediate appellate court. The opposing brief omits to mention that immediately following the language quoted in the brief, this handbook also states: "The right to make offer/ Examining counsel has the right to make offer of proof, and, if properly made, it is error to refuse this right."

tion (J. A. 245a). The Trial Examiner maintained his position on his ruling (J. A. 246a). *Following that came the offer of proof* (J. A. 246a) and the *Trial Examiner's express rejection* thereof. (J. A. 247a). Then came an express ruling by the Trial Examiner that counsel for the respondents may not attack the credibility of the witness. (J. A. 248a).

If plain words have plain meaning, the record of the Trial Examiner's action is clear. *Following* his refusal to permit cross-examination of the witness on credibility, *the offer of proof was made* and *was expressly rejected.* Respondent's opposing brief refers to the "proffered document" (Opp. Br. p. 10). Of course it was "proffered"—as an offer of proof—and as such it was rejected.

As for the respondent's fantastic contention that the efforts of petitioners' counsel to get the offer of proof on the record were "mere conversation" between him and the Trial Examiner: the entire colloquy was *on the record formally,* was made part of the official record, and contained motions, offers, rulings and exceptions, with some argument added pro and con. (J. A. 244a-248a).

Further, the opposing brief charges that petitioners "persistently avoided disclosure of the contents of the proffered document". (Opp. Br. p. 10, footnote 4). The record plainly and completely negates this unwarranted assertion; in fact, it shows the opposite. The Trial Examiner, as the opposing brief admits, saw the document. (Opp. Br. pp. 7, 10). The petitioners' Motion to Reopen the Record certainly describes its substance. (J. A. 407a-408a). The Board's ruling on this Motion clearly shows that the Board knew from the record and from the Motion, what the document was, *and that it was intended to impeach the credibility of the witness.* In this ruling the Board describes the nature of the impeaching evidence petitioners sought to introduce at the hearing and, later, through the Motion to Reopen the Record. (J. A. 410a, footnote 2); and this ruling finds that the Trial Examiner's action in

the matter was "*error*" *(ibid)*. As the record clearly shows, instead of avoiding disclosure of the document, petitioners produced it, showed it, described it, and made every effort to get it on the record and were repeatedly rebuffed.

3. The respondent attempts to distinguish *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 109, cited and quoted in the petition for a writ (Pet. pp. 7, 8-9), on the ground that in that case the Board had made no finding that it had not relied on the testimony of the witnesses sought to be impeached. (Opp. Br. p. 9, footnote 3). The petitioners contend that this is entirely irrelevant to the authority of this case on the issues presented by petitioners in the instant case.

Petitioners rely on this case on several grounds, as pointed out in the petition: (a) this case expressly decides the right of a party in a Board case to "conduct cross-examination material to the issue" and to introduce "material evidence which might impeach" (*Indiana & Michigan* case, p. 28); further, in this case, this court, in sustaining the court below, decided that "the tendered evidence was material for the purpose of 'impeaching the credibility of witnesses before the Board on whose testimony the Board relies for its finding of ultimate facts' ". *(ibid*, p. 15). (b) *Moreover*, as pointed out in the petition for a writ (Pet. p. 9), the Board in this case argued that the testimony of the witnesses whose credibility was sought to be impeached "was either cumulative (being corroborated by other witnesses), or entirely immaterial and *not relied on by the Board;* and that there is *other substantial evidence in the record to support the Board's decision*". *(Indiana & Michigan* case, pp. 16-17; emphasis supplied).

The bare fact that the Board did or did not make a *finding* that it did not rely on the testimony of the witnesses whose impeachment it precluded is irrelevant in the light of the real import of this court's decision in this case. The Board expressly *contended* before this court that it did *not* so rely; this court rejected this argument, and

sustained the basic right to the taking of *material testimony to impeach the credibility of major witnesses for the Board on whose testimony the Board relied. (ibid,* p. 20).

There is no doubt, on the record in the instant case, that Blanche Gross whose impeachment on credibility was expressly precluded by the Trial Examiner, was a major witness for the Board. (Pet. p. 3). Respondent does not mention, contest or challenge this basic fact. The Board, in the nature of the record in this case, had no alternative but to rely on her testimony for major findings, no matter how it attempts to avoid that implication. In the *Indiana & Michigan* case, this court, in the absence of a *finding* by the Board that it did not rely on witnesses sought to be impeached for credibility, where the Board *contended* before this court that it did *not* so rely (a public contention certainly equivalent to such a finding), sustained the lower court *in remanding the case for the purpose of taking testimony on the credibility of Board witnesses on whose testimony the Board relied for its finding of ultimate facts.*

Petitioners respectfully contend that there is a close parallel in the facts in the instant case, and that the decision of the court below in the instant case is in basic conflict with the decision of this court in the *Indiana & Michigan* case.

4. Petitioners respectfully contend that none of the other arguments, decisions or authorities in respondent's opposing brief on the question of denial of due process meet or answer the contentions of the petition.

Palmer v. Hoffman, 318 U. S. 9, cited by respondents (Opp. Br. pp. 9, 10, 11) was referred to and carefully distinguished by petitioners. (Pet. pp. 11, 15). In that case, the petitioner *made no attempt to make an offer of proof;* in fact, cross-examination on credibility was not denied; on the contrary the trial court stated he would admit the document petitioner asked for; but petitioner did nothing further in the matter. (Pet. p. 15). This is the very opposite of the facts in the instant case—the signifi-

cance of the expected testimony here was obvious and clear; the Trial Examiner knew what petitioners expected to prove; the attempt to make an offer of proof was made; and the offer was expressly rejected (J. A. 245a-248a). In *Pacific Mills*, 102 NLRB 385 (cited Opp. Br. p. 10), the Trial Examiner did not refuse to make the rejected testimony (a graph and tabulation of the earnings of a discharged employee) a part of the record; on the contrary, he admitted it into the record as a "rejected exhibit", which to all intents and purposes is the same as an offer of proof on the record. In the instant case the Trial Examiner expressly rejected the offer of proof and refused to permit the proffered document to become part of the record.

Rules 43 (c) and 61 of the Federal Rules of Civil Procedure (Pet. App. p. 21), referred to in respondent's brief (Opp. Br. p. 9) and the cases in other courts of appeals applying these rules, are fully discussed in the petition. (Pet. pp. 11-16). Respondent in its brief does not meet or answer the detailed analysis made by petitioners of these cases, and the extent to which the decision of the court below in the instant case is in conflict with the decisions of other courts of appeals on this subject matter. Thus, respondent's opposing brief makes no mention of the decision in *Downie v. Powers*, 193 F. 2d 276 (CA 10) (Pet. p. 11) that the examining party is *entitled* to make an offer of proof to preserve the question on appeal. Nor does respondent's opposing brief refer to the courts of appeals decisions which hold that an offer of the expected testimony is not an absolute condition to allege error in the exclusion of evidence on appeal where it is otherwise clear what the error is, and its exclusion probably affected substantial rights. (Pet. p. 12, and cases cited there). Moreover, respondent's opposing brief does not attempt to discuss the decisions of other courts of appeals analyzed and cited in the petition (Pet. pp. 12-15) which hold, in circumstances comparable to the instant case, that erroneous admission or exclusion of evidence, including exclusion of evidence

bearing on credibility, is prejudicial error under Rule 61.

Respondent's opposing brief is wrong in asserting that in regard to Rules 43(c) and 61 the "cases cited involved offers of proof which either disclosed the substance of the precluded testimony or the "obvious . . . significance" thereof . . ." (Opp. Br. p. 10-11). An offer of proof of rejected rebuttal testimony, bearing on credibility, was held by other courts of appeals not an absolute condition to allege error in its exclusion. *Maguire v. Federal Crop. Ins. Corp.* 181 F. 2d 320 (CA 5); *Meaney v. U. S.* 112 F. 2d 538 (CA 2). (Cited, with other cases in Pet. pp. 12, 13, 14). *In the instant case it certainly was clear and "obvious" what the error is.* The Board sets this forth in detail in its ruling that the Trial Examiner "*erred*". (J. A. 410a, footnote 2).

The other citations: In *Herencia v. Guzman*, 219 U. S. 44, (cited Opp. Br. p. 9 footnote 2) the appellant offered to present the testimony of a doctor as an expert; when this testimony was not allowed by the court, the appellant merely noted an exception, but failed to note what testimony this witness was expected to give, or that he was qualified to give any—a far cry from the facts in this case. *Clover Fork Coal Co. v. NLRB*, 97 F. (2d) 331 (CA 6) (cited Opp. Br. p. 9) is irrelevant on the issues in the instant case. Here the court stated that certain rebuttal evidence should have been received, but that it was beyond the court's power to overrule the Board. This case was decided under the provisions of the former Wagner Act, 49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*, which, at Section 10(e), 29 U. S. C. Sec. 160(e) provided ". . . the findings of the Board as to the facts, if supported by evidence, shall be conclusive . . .". The court found that there was evidence in the record to support the Board's findings. The instant case is governed by the provisions of the Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. Sec. 141, *et seq.*, which at Section 10(e), 29 U. S. C. Sec. 160(e) now provides ". . . The findings of the Board with respect to

questions of fact, if supported by substantial evidence on the record considered as a whole shall be conclusive . . .". In *N.L.R.B. v. Carpet etc. Layers Union*, 213 F. 2d 49 (CA 10) (cited Opp. Br. p. 9) the decision is entirely irrelevant on the issues in the instant case. Here the alleged error was the admission of some hearsay evidence, which was not considered at all by the Trial Examiner or the Board in making their findings.

The petitioners respectfully contend that the respondent's opposing brief makes no argument and cites no authority which meets or answers the petitioners' contentions in their petition for a writ, or the authorities cited therein.

B. Scope of Boards Findings and Remedy Regarding the Association.

The opposing brief attempts to rely on *Carpenter Steel Co.*, 76 NLRB 670, (cited Opp. Br. p. 11) in answer to petitioners' contention that the Board, in finding and concluding that the Association in the instant case was "dominated" and in ordering its disestablishment, was inconsistent with its own decisions in a series of closely comparable cases in which the Board, on almost identical facts found no "domination" but limited its findings and conclusions to "assistance" and merely ordered withdrawal of recognition until certification.

Petitioners respectfully contend that there is no merit in respondent's argument; the respondent oversimplifies the *Carpenter Steel* decision.

To begin with, it must be noted that in the *Carpenter Steel* case the Board dealt with *another* disparity in its decisions. Until this decision, made in March, 1948, the Board had refused to charge *affiliated unions* with "domination"; the charge and complaint in such cases had been limited to "assistance"; the Board's findings and conclusions had been "assistance" (not "domination", regardless of the evidence), and the remedy withdrawal of recognition. *Carpenter Steel Co., ibid.* This case was a Wagner Act

case; but it came before the Board early in 1948 after that Act had been replaced by the Taft-Hartley Act, effective in the Summer of 1947. The new law, 61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*, provides, at Section 10(c), 29 U. S. C. Sec. 160(c) ". . . That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope . . .". Referring to this provision of the new law, the Board, in the *Carpenter Steel* case announced that it would henceforth end the former disparity in the treatment of unaffiliated and affiliated unions in this type of case. At the same time, the Board announced that it would in such cases henceforth order disestablishment only where it made a finding or conclusion of "domination" and would order withdrawal of recognition where it made a finding or conclusion of "assistance".

The only guide for making this distinction indicated by the Board in the *Carpenter Steel* case is quite subjective. "When we find that an employer's unfair labor practices have been so extensive as to constitute domination of the organization, we shall order its disestablishment . . . But where the Board finds that an employer's unfair labor practices were so limited to interference and support and never reached the point of domination, we shall only order that recognition be withheld until certification . . .". *Carpenter Steel Co., ibid*, at p. 673.

In this view of the *Carpenter Steel* case, and in view of a lack of specification by the Board of the elements which might support a conclusion of "domination", there is *nothing sacrosanct* in the Board's findings or conclusions of "domination" in any case, as respondent's opposing brief tries to assume. Nor has the Board been consistent in its findings and conclusions of what amounts to a lack of such domination, with the consequent less drastic remedy

in the Board's order, as is shown by a comparison of the Board's decision in the instant case with the basic evidentiary findings set forth in detail in the series of cases cited in the petition. (Pet. pp. 16-18). As these cases clearly demonstrate, in a series of cases in which the facts are closely comparable to those in the instant case, the Board made a conclusion of *"assistance" only* and limited the remedy to withdrawal of recognition, in some of the cases reversing the Trial Examiner.

In a very recent decision, issued on October 5, 1954 after the petition for a writ in the instant case had been prepared, the Board again reversed a Trial Examiner in a case closely comparable to the instant case, reduced the finding or conclusion to one of "assistance" instead of "domination", and reduced the remedy from disestablishment to withdrawal of recognition. *Sears, Roebuck & Co.*, 110 NLRB No. 30, 34 LRRM 1630. In this case the Board and the Trial Examiner found that an unaffiliated Council of the company's employees, previously certified by the Board, with a contract with the Company, had voted at a meeting to join an AFL union, which then asked for recognition for collective bargaining. The company then, acting through its agents, revived the Council; worked with a few of its "loyal and trusted" employees to activate it; permitted them to leave work at will contrary to company rules and paid them for it; paid for all expenses of the Council; consulted with the Council's attorney on internal affairs of the Council; and in other ways (not unlike the findings in the instant case) assisted it.

This very recent decision by the Board, like the series of decisions cited in the petition for a writ in the instant case, shows a *continuing lack of consistency* between the Board's finding or conclusion of "domination" and the consequent remedy of disestablishment in the instant case, and the closely comparable cases summarized in the petition (Pet. pp. 16-18), in which the Board made the lesser finding of "assistance" and applied the lesser remedy.

Petitioners respectfully contend that this problem raises an important issue of federal law which should be determined by this court.

Conclusion

Because of the reasons stated, petitioners respectfully submit that the brief of the respondent in opposition is without merit. Because of the reasons stated in the petition and in this reply, petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

REGINALD S. HEMINGWAY,
238 Market Street,
Bloomsburg, Pa.,
Counsel for Petitioners.

JOHN F. DUMONT,
Stanton Building,
Little Falls, N. J.,
Counsel for Petitioners.

November, 1954